

G. Thomas Martin, III, Esq. (SBN 218456)
Nicholas J. Bontrager, Esq. (SBN 252114)
MARTIN & BONTRAGER, APC
6464 W. Sunset Blvd, Suite 960
Los Angeles, CA 90028
Telephone: 323.940.1700
Facsimile: 323.328.8095
tom@mblawapc.com
nick@mblawapc.com
Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JEANETTE SMITH,
Plaintiff,
vs.
CAPITAL ONE BANK, N.A.,
Defendant(s).

Case No.: 2:18-cv-5755

**COMPLAINT AND DEMAND FOR
JURY TRIAL FOR:**

- 1. VIOLATIONS OF THE
ROSENTHAL FAIR DEBT
COLLECTION PRACTICES
ACT [CAL. CIV. CODE § 1788]**
 - 2. VIOLATIONS OF THE
TELEPHONE CONSUMER
PROTECTION ACT [47 U.S.C. §
227]**

INTRODUCTION

1. JEANETTE SMITH (Plaintiff) bring this action to secure redress from CAPITAL ONE BANK, N.A. (Defendant) for violations of the Rosenthal Fair Debt Collection Practices Act [CAL. CIV. CODE § 1788] and for violations of the Telephone Consumer Protection Act [47 U.S.C. § 227].

JURISDICTION AND VENUE

2. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1331 as Plaintiff's claims arise under the laws of the United States.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the acts and transactions alleged in this Complaint occurred here, Plaintiff resides here, and Defendant transacts business here.

PARTIES

4. Plaintiff is an individual residing in Los Angeles, California. Plaintiff is a natural person from whom a debt collector seeks to collect a consumer debt which is due and owing or alleged to be due and owing from such person.

5. Defendant, is a national bank engaged in the business of collecting debt in this state and in several other states, with its principal place of business located in Virginia. The principal purpose of Defendant is the collection of debts in this state and several other states, and Defendant regularly attempts to collect debts alleged to be due another.

FACTUAL ALLEGATIONS

6. Within one year prior to the filing of this action, Defendant contacted Plaintiff to collect money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction and/or "consumer debt" with respect to Plaintiff's personal credit account.

7. Defendant constantly and continuously called Plaintiff at her telephone number ending in 3374 with the intent to harass Plaintiff into paying alleged debt. Defendant called Plaintiff upwards of two (2) to four (4) times in a single day on a regular and daily basis for several months between December 2017 and June 2018.

8. Defendant communicated with Plaintiff with such frequency as to be unreasonable under the circumstances and to constitute harassment, including upwards of at least four (4) telephone calls in one day. Defendant called on several

1 and numerous other occasions with the intent to harass Plaintiff beginning in
2 December of 2017 and well into June of 2018.

3 9. The natural and probable consequences of Defendant's conduct was
4 to harass, oppress or abuse Plaintiff in connection with the collection of the alleged
5 debt.

6 10. On or about March 23, 2018, Plaintiff answered one of Defendant's
7 calls and advised an agent that Defendant was to cease placing any further calls to
8 Plaintiff and her cellular telephone. Despite these clear instructions, Defendant
9 continued to place its autodialed collection calls to Plaintiff's cellular telephone
10 into June of 2018.

11 11. Further, during this March 23, 2018 call, Plaintiff also advised that she
12 was not in a financial position where she can make payments due to various
13 unfortunate events. Despite this clear information, Defendant intentionally
14 continued to place its autodialed collection calls to Plaintiff's cellular telephone
15 into June of 2018. Defendant's conscious decision to continue placing these
16 incessant calls to Plaintiff, knowing she was unable to make payment, was made
17 solely to abuse, harass and/or annoy Plaintiff as a result.

18 12. Upon information and belief, Plaintiff alleges that Defendant placed
19 at least **one hundred and twenty (120) autodialed collection calls** to Plaintiff's
20 cellular telephone after Plaintiff had revoked consent to receive such calls on her
21 cellular telephone.

22 13. Defendant and/or its agent(s) used an "automatic telephone dialing
23 system", as defined by 47 U.S.C. § 227(a)(1) to place these aforementioned
24 collection calls to Plaintiff. Defendant's autodialing technology is equipment that
25 has the capacity to store or produce telephone numbers to be called using a random
26 or sequential number generator. The dead air that the Plaintiff experienced on the
27 calls that she received (i.e., when Plaintiff answered there was several seconds
28 where no other person was on the other end) is indicative of the use of an automatic

1 telephone dialing system.

2 14. This “dead air” is commonplace with autodialing equipment. It
3 indicates and evidences that the algorithm(s) being used by Defendant’s and/or its
4 agent’s autodialing equipment has not been perfected and/or has not been recently
5 refreshed or updated. Thus resulting in the autodialer placing a call several seconds
6 prior to the human agent’s ability to end the current call he or she is on and be ready
7 to accept the new connected call that the autodialer placed, without human
8 intervention, to Plaintiff.

9 15. The dead air is essentially the autodialer holding the call it placed to
10 Plaintiff until the next available human agent is ready to accept it. Should the call
11 at issue been manually dialed by a live human being, there would be no such dead
12 air as the person dialing Plaintiff’s cellular telephone would have been on the other
13 end of the call the entire time and Plaintiff would have been immediately greeted
14 by said person.

15 16. Defendant’s calls constituted calls that were not for emergency
16 purposes as defined by *47 U.S.C. § 227(b)(1)(A)*.

17 17. Defendant’s calls were placed to a telephone number assigned to a
18 cellular telephone service for which Plaintiff incurs a charge for incoming calls
19 pursuant to *47 U.S.C. § 227(b)(1)*.

20 18. As of March 23, 2018, when Plaintiff first demanded that Defendant
21 cease placing its calls to her cellular telephone, any such consent for Defendant to
22 place its autodialed calls (assuming it existed in the first place), was revoked by
23 Plaintiff. Accordingly, Defendant did not have Plaintiff’s “prior express consent”
24 to receive calls using an automatic telephone dialing system on her cellular
25 telephone pursuant to *47 U.S.C. § 227(b)(1)(A)*.

26 19. As a result of Defendant’s alleged violations of law by placing these
27 automated calls to Plaintiff’s cellular telephone without prior express consent,
28 Defendant caused Plaintiff harm and/or injury such that Article III standing is

1 satisfied in at least the following, if not more, ways:

- 2 a. Invading Plaintiff's privacy;
- 3 b. Electronically intruding upon Plaintiff's seclusion;
- 4 c. Intrusion into Plaintiff's use and enjoyment of her cellular
- 5 telephone;
- 6 d. Impermissibly occupying minutes, data, availability to answer
- 7 another call, and various other intangible rights that Plaintiff has as to
- 8 complete ownership and use of her cellular telephone;
- 9 e. Causing Plaintiff to expend needless time in receiving, answering,
- 10 and attempting to dispose of Defendant's unwanted calls.

11 **FIRST CAUSE OF ACTION**

12 **(Violation of the RFDCPA, CAL. CIV. CODE § 1788)**

13 20. Plaintiff incorporates by reference all of the above paragraphs of this
14 Complaint as though fully stated herein.

15 21. Defendant violated the RFDCPA. Defendant's violations include, but
16 are not limited to, the following:

17 (a) Defendant violated CAL. CIV. CODE § 1788.11(d) by causing a
18 telephone to ring repeatedly or continuously to annoy the person called; and

19 (b) Defendant violated CAL. CIV. CODE § 1788.11(e) by communicating,
20 by telephone or in person, with the debtor with such frequency as to be
21 unreasonable and to constitute an harassment to the debtor under the circumstances;

22 (c) Defendant violated CAL. CIV. CODE § 1788.17 by collecting or
23 attempting to collect a consumer debt without complying with the provisions of
24 Sections 1692b to 1692j, inclusive, of . . . Title 15 of the United States Code (Fair
25 Debt Collection Practices Act).

26 22. Defendant's acts, as described above, were done intentionally with the
27 purpose of coercing Plaintiff to pay the alleged debt.

23. As a result of the foregoing violations of the RFDCPA, Defendant is liable to Plaintiff for actual damages, statutory damages, and attorney's fees and costs.

SECOND CAUSE OF ACTION

(Violations of the TCPA, 47 U.S.C. § 227)

24. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

25. Defendant violated the TCPA. Defendant's violations include, but are not limited to the following:

(a) Within four years prior to the filing of this action, on multiple occasions, Defendant violated TCPA 47 U.S.C. § 227 (b)(1)(A)(iii) which states in pertinent part, “It shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice — to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call.

(b) Within four years prior to the filing of this action, on multiple occasions, Defendant willfully and/or knowingly contacted Plaintiffs at Plaintiffs' cellular telephone using an artificial prerecorded voice or an automatic telephone dialing system and as such, Defendant knowing and/or willfully violated the TCPA.

26. As a result of Defendant's violations of 47 U.S.C. § 227, Plaintiff is entitled to an award of five hundred dollars (\$500.00) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B). If the Court finds that Defendant knowingly and/or willfully violated the TCPA, Plaintiff is entitled to an award of one thousand five hundred dollars (\$1,500.00), for each and every violation pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

27. Plaintiff is also entitled to seek injunctive relief prohibiting such conduct in the future.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that judgment be entered against Defendant for the following:

- (a) An injunction prohibiting Defendant from contacting Plaintiff on Plaintiff's cellular telephone using an automated dialing system pursuant to 47 U.S.C. § 227(b)(3)(A); and
 - (b) Actual damages pursuant to CAL. CIV. CODE § 1788.30(a); and
 - (c) As a result of Defendant's violations of 47 U.S.C. § 227(b)(1), Plaintiff is entitled to and requests five hundred dollars (\$500.00) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B); and
 - (d) As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff is entitled to and requests treble damages, as provided by statute, up to one thousand five hundred dollars (\$1,500.00), for each and every violation pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C); and
 - (e) Statutory damages pursuant to CAL. CIV. CODE § 1788.30(b); and
 - (f) Costs and reasonable attorney's fees pursuant to CAL. CIV. CODE § 1788.30(c); and
 - (g) Awarding Plaintiff any pre-judgment and post-judgment interest as may be allowed under the law; and
 - (h) For such other and further relief as the Court may deem just and proper.

1 **DEMAND FOR JURY TRIAL**
2

3
4
5
6 Please take notice that Plaintiff demands a trial by jury in this action.
7

8
9
10 Dated: June 29, 2018

11 RESPECTFULLY SUBMITTED,
12 **MARTIN & BONTRAGER, APC**

13 By: /s/ G. Thomas Martin, III

14 G. Thomas Martin, III
15 *Attorney for Plaintiff*

16
17
18
19
20
21
22
23
24
25
26
27
28